No. SCWC-13-0000127

IN THE SUPREME COURT OF THE STATE OF HAWAII

OAHU PUBLICATIONS, INC., *dba* Honolulu *Star-Advertiser*, Petitioner/Plaintiff-Appellee, vs. NEIL ABERCROMBIE, in his official capacity as Governor of the State of Hawaii, Respondent/Defendant-Appellant.	ON APPLICATION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS 1. Order (Jan. 6, 2014) 2. Order Granting in Part Plaintiff-Appellee's Motion for Reconsideration or Clarification of Order Denying Fees and Costs (Jan. 24. 2014) 3. Order (Feb. 24, 2014) 4. Judgment on Appeal (Mar. 3, 2014) Circuit Court (First Circuit) Civil No. 11-1-1871-08-KKS Hon. Karl K. Sakamoto Final Judgment: Feb. 8, 2013

PETITIONER'S REPLY BRIEF

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In order to fulfill the UIPA's fundamental purpose of "[p]romot[ing] the public interest in disclosure," the standards governing the timing of a request for fees and expenses incurred in appellate litigation must be clear, and conform to the requirements of the statute.[1] The Intermediate Court of Appeals (ICA) muddled the process by mechanically enforcing Rule 39(d)'s deadline without considering the language of section 92F-15(d) that a complainant must first prevail in the "action" and "the litigation" before it may seek fees and expenses. By accepting certiorari, this Court can provide the necessary clarity.

Governor Abercrombie's Response in Opposition (Resp.) (SCWC-13-0000127 Dkt. 21) never confronts the gravest error by the ICA: its assumption that dismissal of CAAP-12-0000625 for lack of appellate jurisdiction ended the appellate litigation in the *Star-Advertiser*'s favor, which meant it had to seek fees and expenses immediately.[2] In CAAP-12-0000625, however, the ICA could not reach the question of whether the circuit court abused its discretion by assessing Governor Abercrombie fees and expenses incurred in the circuit court by the *Star-Advertiser*. The ICA merely concluded it did not have appellate jurisdiction because Governor Abercrombie failed to ensure the circuit court's judgment was final. A ruling on the merits of the appeal would have to wait until after Governor Abercrombie perfected his appeal in CAAP-13-0000127. In other words, CAAP-12-0000625 was premature, but Governor Abercrombie could try again. He did, after which the ICA resolved the merits of the appeal in the *Star-Advertiser*'s favor in CAAP-13-0000127 by concluding

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[1] *See* Haw. Rev. Stat. § 92F-15(d) ("If the complainant *prevails in an action* brought under this section, the court shall assess against the agency reasonable attorney's fees and all other expenses reasonably incurred *in the litigation*.") (emphasis added). *See also id.* § 92F-2 ("In a democracy, the people are vested with the ultimate decision-making power. Government agencies exist to aid the people in the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest.").

In this Reply, the Uniform Information Practices Act, Haw. Rev. Stat. ch. 92F, is referred to as "UIPA," Petitioner/Plaintiff-Appellee Oahu Publications, Inc., *dba* Honolulu *Star-Advertiser* is referred to as "*Star-Advertiser*," and Respondent/Defendant-Appellant Neil Abercrombie is referred to as "Governor Abercrombie."

[2] *See* Haw. R. App. P. 39(d)(2) ("A request for fees and costs or necessary expenses must be filed with the appellate clerk, with proof of service, no later than 14 days after the time for filing a motion for reconsideration has expired or the motion for reconsideration has been decided. An untimely request for fees and costs or necessary expenses may be denied.").

the circuit court properly assessed fees and expenses. *See* Summary Disposition Order (Oct. 18, 2013) (CAAP-13-0000127 Dkt. 56). Only then did the *Star-Advertiser*'s request under Haw. Rev. Stat. § 92F-15(d) for fees and expenses incurred in the ICA become ripe.

I. PREVAILING IN THE CIRCUIT COURT ON THE JSC LIST ISSUE IS NOT THE SAME AS PREVAILING IN THE ICA ON THE FEES ISSUE.

The Response offers nothing to support the ICA's erroneous assumption. Instead, Governor Abercrombie makes an argument that is difficult to understand, and even harder to accept. He asserts the *Star-Advertiser* already had achieved prevailing complainant status by virtue of the circuit court's order compelling him to publicly disclose the JSC list. Because he did not appeal that order, he argues, the *Star-Advertiser* remained the prevailing party in the ICA and thus was required to seek fees and expenses when the court dismissed CAAP-12-0000625. *See* Resp. at 7 ("[N]othing would have prevented the Star-Advertiser from filing a request for fees and costs on appeal after the appeal in CAAP-12-0000625 was dismissed, because the appeal was not from the circuit court's holding on the main issue, i.e., whether the Governor was required to disclose, and the order dismissing the appeal did not alter the summary judgment entered in the Star-Advertiser's favor with respect to the obligation to disclose."). The faulty foundation of the Response is revealed only on its final page:

> *The Star-Advertiser incorrectly assumed that it needed to prevail in the fee appeal in order to claim fees on appeal in CAAP No. 12-0000625 after the appeal was dismissed.* While the Star-Advertiser clearly relinquished its ability as the prevailing party in the case to enforce the circuit court's fee order by agreeing to stay its effect while the appeal from the order was pending in CAAP No. 12-0000625, the ICA's dismissal of that appeal for lack of jurisdiction did not diminish or alter the Star-Advertiser's as the "prevailing party" in the case – it did not lose any ground with respect to the disputed main issue in the case, i.e., disclosure, and dismissal of the appeal restored its ability to enforce the fee order at least until it again agreed to stay the order pending disposition of the Governor's second fee appeal in CAAP No. 13-0000127.

Resp. at 8 (emphasis added). The ICA did not rely on Governor Abercrombie's flawed logic to reach its conclusion, nor should this Court.[3] The argument is nonsense because it conflates two is-

[3] The ICA did not, as the Response asserts, deny "the request for fees and costs for the appeal in CAAP-120000625 *because the request was filed almost a year after the legal work was performed*." Resp. at 1 (emphasis added). That was not the court's rationale. Rather, it concluded the *Star-Advertiser*'s request was not timely under Rule 39(d) because it should have been filed after the ICA's jurisdictional dismissal. When the fees and expenses were incurred had nothing to do with its conclusion.

sues: whether the *Star-Advertiser* was awarded its fees and expenses for prevailing in the ICA is distinct from whether it prevailed in the circuit court on the underlying JSC list issue. Just because the *Star-Advertiser* prevailed in the circuit court on JSC list disclosure does not mean it would have prevailed in the ICA on the separate issue on which Governor Abercrombie appealed. If the ICA—instead of concluding that the amounts the circuit court assessed were within its discretion—agreed with Governor Abercrombie's point of error and substantially disallowed fee and expense recovery, then the *Star-Advertiser* obviously would not have been entitled to recover appellate fees and expenses from the ICA, even though it remained the prevailing complainant in the circuit court.[4]

Governor Abercrombie's theory results from a misreading of *Hawaiian Ass'n of Seventh-Day Adventists v. Wong*, 130 Haw. 36, 305 P.3d 452 (2013), because he fails to keep the issue in the circuit court separate from the issue he raised in the ICA. Yes, *Seventh-Day Adventists* stands for the proposition that only after the prevailing party is determined may that party request fees and expenses. But that certainly cannot mean that once the *Star-Advertiser* prevailed in the circuit court on the JSC list disclosure issue and Governor Abercrombie did not appeal that ruling, the *Star-Advertiser* was, from then on, the prevailing party in the ICA, irrespective of whether it prevailed in the appeal of the fee assessment. Quite the opposite: the *Seventh-Day Adventist* rule, in the context of an appeal and applied to this case, supports the conclusion that the *Star-Advertiser*'s request for appellate fees was not ripe until the ICA ruled in its favor on the merits *of the issues presented by the appeal*. *See* Cert. App. at 9.[5] Governor Abercrombie's argument leads to the strange conclusion that in the circumstances presented here, the ICA must *always* award fees and expenses incurred on appeal by a UIPA complainant who prevailed in the circuit court, even if it loses in the ICA. Alt-

[4] Accepting Governor Abercrombie's theory will give parties in similar circumstances the opportunity to approve technically deficient circuit court judgments, move for dismissal once the case is on appeal, and then seek fees and costs.

[5] *Food Pantry, Ltd. v. Waikiki Bus. Plaza, Inc*., 58 Haw. 606, 575 P.2d 869 (1978) is similarly unhelpful to Governor Abercrombie's argument. He asserts that the case stands for the proposition that a prevailing party, "'is a party who has prevailed on the disputed main issue.'" Resp. at 7 (quoting *id*. at 620, 575 P.2d at 879). Again, however, he overlooks the obvious fact that "the disputed main issue" in the ICA in the present case was different than the "disputed main issue" in the circuit court. For an example, look no further than *Food Pantry*'s footnote 5, in which the Court relies on *Christian v. Waialua Agric. Co*., 32 Haw. 30 (Terr. 1931), a case that distinguishes between a party who prevails in circuit court, and one who prevails on appeal. *Id*. at 31 (a party may prevail on appeal even though it is only successful on one of its two points of appeal).

hough section 92F-15 was designed "to remove barriers to judicial enforcement," it does not sanction this bizarre rule. *Cf. State of Haw. Org. of Police Officers v. Soc'y of Prof'l Journalists-Univ. of Haw. Chapt*er, 83 Haw. 378, 393, 927 P.2d 386, 401 (1996) ("It was obviously the intent of the legislature to remove barriers to judicial enforcement of the UIPA").

II. RULE 39's DEADLINE IS CONSISTENT WITH SECTION 92F-15(d) WHEN MEASURED FROM A RULING ON THE MERITS ON APPEAL.

The Response also overstates the *Star-Advertiser*'s position by asserting its argument is premised on a conflict between section 92F-15(d)'s "in the litigation" requirement, and the 14-day deadline in Rule 39(d). To the contrary, as the *Star-Advertiser*'s Application noted, in *Cnty. of Hawaii v. C & J Coupe Family Ltd. P'ship*, 120 Haw. 400, 208 P.3d 713 (2009), this Court held that fee-shifting statutes should be read together with Rule 39, and "effect should be given to both, if possible." *Id*. at 406, 208 P.3d at 719. Which is precisely what the *Star-Advertiser* asserts the ICA got wrong. The court failed to take section 92F-15(d)'s "in an action" and "in the litigation" language into account when it mechanically applied Rule 39 and held the *Star-Advertiser* must have requested fees and expenses upon the jurisdictional dismissal of CAAP-12-0000625, and could not wait until the court resolved the merits of the appeal in CAAP-13-0000127.[6]

The Response's reliance on 42 U.S.C. § 1988 and Fed. R. Civ. P. 54(d) does not undercut this argument, but rather supports it. *See* Resp. at 6 & n.2. There, Governor Abercrombie correctly notes that a motion for fees and costs under the federal standards must "(i) be filed no later than 14 days after the entry of judgment[.]" Applied to the present case, which "judgment" does this mean, the dismissal of CAAP-12-0000625, or the ruling on the merits in CAAP-13-0000127?[7] Quoting the Advisory Committee Notes, the Response states: "[i]n many nonjury cases the court will want to consider attorneys' fee issues immediately after rendering its *judgment on the merits of the case*…." Resp. at 6 n.2 (emphasis added). This underscores that an application for fees incurred on appeal is only ripe once the appellate court has made a ruling on the merits *of the appeal*, and not when the

[6] Of course, if there is an irreconcilable conflict between the timing requirements of section 92F-15(d) and Rule 39(d), the statute's requirements are paramount. *See* Cert. App. at 7 n.3 (SCWC-13-0000127 Dkt. 1).

[7] Reinforcing the argument that a jurisdictional dismissal is not a judgment on the merits is the fact that the ICA did not enter a judgment in CAAP-12-0000625 after its jurisdictional dismissal. It only issued a Judgment on Appeal in CAAP-13-0000127 after its ruling on the merits. *See* CAAP-13-0000127 Dkt. 97.

court makes a merely jurisdictional dismissal.

III. CONCLUSION

The Response avoids the most critical dispositive issue presented. The *Star-Advertiser* was not the prevailing complainant in the ICA phase of "the litigation" until the court ruled in its favor on the merits of the appeal in CAAP-13-0000127. Governor Abercrombie's failure to defend the ICA's rationale highlights the need for this Court's review, which should accept certiorari and vacate the ICA's orders rejecting the *Star-Advertiser*'s request for UIPA fees and expenses (CAAP-13-0000127 Dkt. 75), and motion for reconsideration (CAAP-13-0000127 Dkt. 88). This case should be remanded to the ICA for full consideration of the *Star-Advertiser*'s timely request for all fees and expenses incurred in the course of CAAP-12-0000625.

DATED: Honolulu, Hawaii, May 24, 2014.

Respectfully submitted.

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I hereby certify that true and correct copies of the foregoing Petitioner's Reply Brief was served on the following parties as follows:

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